

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,

v.

CRAIG FOLSOM and
ROXANNA SANBORN,

Defendants

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Crim. No. 04-40-B-W

**RECOMMENDED DECISION ON MOTIONS TO SUPPRESS AND
ORDER ON MOTION FOR ORAL ARGUMENT/HEARING**

The defendants, Roxanna Sanborn and Craig Folsom, are being prosecuted for a marijuana cultivation and distribution operation. According to the government's indictment, the defendants knowingly manufactured and possessed marijuana plants, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The defendants have moved to suppress evidence of their indoor marijuana cultivation operation that was obtained during the execution of a search warrant at their premises. According to defendant Sanborn, the warrant should not have issued because the facts recited do not support a finding of probable cause and the officer who sought the warrant made false and misleading statements in the affidavit he submitted in support of the warrant, without which, it is argued, probable cause could not be found. (Docket No. 36.) Defendant Folsom likewise moves to suppress evidence for the same reasons and has separately moved that the court hold oral argument and/or a Franks evidentiary hearing on the pending motions. (Docket Nos. 41 & 42.) I now **DENY** the request for an evidentiary hearing and I recommend that the court **DENY** the motions to suppress. All parties have briefed the issues fully and I see no reason to hold oral argument on the motions prior to issuing a

recommended decision. The parties, of course, are free to renew a request for oral argument should any of them object to my recommended decision.

Factual Background

The pertinent facts in support of and opposition to these motions are drawn from (1) the affidavit of Troy Bires filed in support of the state search warrant application¹ directed against the Sanborn and Folsom residence at 6 West Side Road in Sorrento, Maine, (2) the affidavit of Jeremy Cox that was incorporated in Troy Bires's search warrant application, (3) the affidavits of Andrew Miller, Roxanna Sanborn, a/k/a Roxanna Carter, and Craig Folsom that were filed in support of the defendants' motions to suppress, and (3) the affidavits of Troy Bires, Harold Page, and Janis Piper that were filed in opposition to the defendants' motions to suppress and defendant Folsom's request for a Franks evidentiary hearing.

Special Agent Troy Bires is a law enforcement officer with the Maine Drug Enforcement Agency (MDEA). On or about March 10, 2004, Agent Bires executed an affidavit and request for search warrant to search the defendants' premises located in Sorrento. According to Agent Bires, he had been informed on March 4, 2004, by Jeremy Cox of the Ellsworth Police Department that a concerned citizen (informant) known to Officer Cox had informed Cox that certain individuals were going to the defendants' residence on a regular basis to assist with an indoor marijuana cultivation operation. The informant indicated that s/he had observed one of these individuals with a large amount of cash and had been informed by this individual that he was selling marijuana for defendant Folsom. The informant also indicated that one of the individuals had helped Folsom dig an underground room and that Folsom had placed privacy

¹ The original submissions by the parties did not contain a complete copy of the state search warrant and the Bires affidavit in support of that warrant with the incorporated Jeremy Cox affidavit. I orally requested that the parties submit a joint exhibit containing those exhibits. They have done so in paper form, identified as Joint Exhibit A (See Docket No. 48).

fencing around the house to prevent people from seeing into the basement. According to Officer Cox's affidavit, the second individual of whom the informant spoke was arrested for cultivation of marijuana in 2003. Also according to Officer Cox's affidavit, the informant indicated that s/he sought out law enforcement after ending a relationship "with one of the parties involved" in March 2004. The information provided by the informant concerns activity occurring roughly between November 2003 and March 2004. Officer Cox's affidavit, Special Agent Bires's affidavit and the search warrant application were all executed on March 10, 2004. A justice of the peace issued the search warrant that same day. According to the affidavit of Frederick Luce,² an officer with the Brewer Police Department and a member of the MDEA Task Force, the warrant was executed at approximately 7:30 on the evening of March 10 and the ensuing search of the defendants' premises yielded over 400 marijuana plants, 19.5 pounds of processed marijuana, 10.5 ounces of hashish, 28 grams of cocaine, and over \$16,000 in cash.

The nub of the defendants' motions to suppress concerns sworn statements Agent Bires included in his search warrant application about electrical usage at the defendants' premises. Based on the statements provided by the informant, Agent Bires had obtained an administrative subpoena to get records from Bangor Hydro Electric Company reflecting the electric usage at the defendant's premises. The records he obtained reflect power usage tolls from February 2001 through February 2004. In the months between February 2001 and January 2002, the toll was 9,939 kilowatt hours ("kwh") over 365 days, for an average daily toll of approximately 27 kwh. For the period between February 2002 and February 2003, however, the toll came to 22,891 kwh over 392 days, or an average daily toll of approximately 58 kwh, more than double the preceding period. Finally, for the period between March 2003 and February 2004, the toll came to 35,405

² Officer Luce's affidavit was submitted in conjunction with the government's complaint and can be found at docket number 1.

kwh over 364 days, an average daily toll of approximately 97 kwh, more than triple the level of the initial one-year period. Although the first two periods of time discussed above do not reflect significant seasonal fluctuations in usage, the third period does. The average daily toll rate for November 2003 through February 2004 rises to approximately 144 kwh, possibly suggesting that electrical usage may have related, at least in part, to increased use of electrical heating fixtures or appliances. In his affidavit, Agent Bires related that the premises had a large pile of wood in the yard and visible smoke rising from its two chimneys. The obvious implication of this assertion is that the electricity usage was not related to electrical heat. Agent Bires also related that representatives of Bangor Hydro informed him that the premises had a large consumption of power for a single-family residence. Pulling these pieces of evidence together, Agent Bires represented in his affidavit that "excessive usage of electricity is consistent with the high consumption associated with indoor cultivation of marijuana [which] utilizes large quantities of electricity to operate pumps, fans, humidifiers and high intensity lights." (Affidavit and Request, ¶ 8.) In a further effort to bolster the already significant inference that the substantial increase in power usage related to marijuana cultivation, Agent Bires indicated that he was informed by Lieutenant Harold Page of the Ellsworth Police Department that Bangor Hydro representatives had informed Page that the residence did not have electric heat fixtures.

The defendants contend that S/A Bires's affidavit contained false or misleading statements that were material to the justice of the peace's ability to make his probable cause determination. Specifically, the defendants argue and offer affidavit testimony to support that Bangor Hydro cannot tell from its toll records whether a household has electric heat fixtures or not. (Aff. of Andrew Miller, Docket No. 37.) Defendant Sanborn has also submitted her own affidavit, in which she relates that she knows who the informant is and that the informant was

last in the defendants' home in 2001. Ms. Sanborn also informs the court that she heated her home almost exclusively with electric heat beginning in 2001 and that an addition was added to her home in 2003, both of which facts might tend to explain the increase in electricity usage beginning in 2002. (Aff. of Roxana Carter, Docket No. 37.) Defendant Folsom's affidavit supports the information provided by Sanborn and also notes that construction related to the addition to the residence would have been open and obvious to anyone who viewed the premises from the air as law enforcement officers allegedly did. (Aff. of Craig Folsom, Docket No. 42.)

Discussion

Defendant Sanborn argues that the materials submitted by Agent Bires were insufficient to support a finding of probable cause because the information was stale and because it included a material falsehood made knowingly and intentionally, or with reckless disregard for the truth. (Docket No. 36.) Defendant Folsom makes much the same arguments, but focuses more on the reliability of the informant's statements.

Probable cause to issue a search warrant exists when "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." The task of the reviewing court is to determine whether "a substantial basis" existed for the magistrate's determination that probable cause existed. Factors to be considered in determining whether a search warrant should issue include "the value of corroboration of details of an informant's tips by independent police work."

United States v. Keene, 341 F.3d 78, 81 (1st Cir. 2003) (quoting Illinois v. Gates, 462 U.S. 213, 238, 241 (1983)). The probable cause analysis includes a temporal component. A magistrate's finding that there is probable cause to issue a search warrant cannot be based solely on stale or outdated information. United States v. Watson, 423 U.S. 411, 450 n.14 (1976).

1. The warrant application sets forth probable cause based on reliable and timely information.

The defendants argue that probable cause did not exist to issue the warrant because nothing about the informant's background was provided in the warrant application, there is no indication that the informant actually witnessed any ongoing criminal activity, nothing was done to corroborate the information s/he provided to law enforcement, and more should have been done because the informant indicated that s/he was providing information because s/he had just ended a relationship with someone involved with the defendants. These arguments are unavailing because, given the nature of the criminal activity they were alerted to, the officers' investigation into electrical records provided reliable information that tended strongly to corroborate the information provided by the informant. In addition to the electrical records, it was known to the officers that one of the individuals the informant spoke of as selling marijuana for defendant Folsom was already charged with marijuana cultivation. As for the timeliness of the information related in the warrant application, there is nothing stale about any of it. The information provided by the informant concerned ongoing activity transpiring through February 2004, one month before the search, and the electrical records included information suggestive of continuous and ongoing criminal activity over several months through and including February 2004. See United States v. Hershenow, 680 F.2d 847, 853 (1st Cir. 1982) ("Where the information points to illegal activity of a continuous nature, the passage of several months between the observations in the affidavit and the issuance of the warrant will not render the information stale."). Presented with this picture, it is no surprise that the justice of the peace's common sense view was that a fair probability existed that evidence of a crime would be found in the defendants' premises.

2. *The defendants fail to make a substantial preliminary showing for a Franks hearing.*

The defendants challenge this search warrant affidavit under Franks v. Delaware, 438 U.S. 154 (1978), alleging that the affidavit contains false and misleading statements. In order to obtain an evidentiary hearing on the issue of allegedly false statements contained within an affidavit submitted in support of a search warrant, a defendant must make a "substantial preliminary showing" that the statement was false or misleading, that it was made knowingly and intentionally or with reckless disregard for the truth, and that the statement was necessary for a finding of probable cause. United States v. Scalia, 993 F.2d 984, 986-87 (1st Cir. 1993). In this case the defendants' Franks claim relates to Officer Bires's statement in the search warrant affidavit that "Lt. Harold Page of the Ellsworth Police department spoke with a representative of Bangor Hydro and was told that the residence did not have electric heat." According to the defendants, that statement is false and was made knowingly and intentionally or with reckless disregard for the truth. Even if the court assumes that this statement was made with reckless disregard for the truth, the statement was not necessary to a finding of probable cause. Based on the information provided by the informant and the electrical records themselves, the justice of the peace had a substantial basis for his common-sense determination that there was a fair probability that evidence of a crime would be found at the defendants' premises. See id. at 986.

The affidavits supplied by the defendants simply do not rise to the level of a "substantial preliminary showing" because the fact that the defendants' premises expanded and were heated by electrical fixtures does not undermine the probable cause analysis. The electrical records reflect that electrical usage for 2002 was at its peak in the fall rather than the winter, which tends strongly to erode the argument that the justice of the peace should have assumed legitimate electrical consumption for heating purposes. Furthermore, although the data reflected in Agent

Bires's affidavit reveals that the 2003-2004 winter months had the highest levels of monthly electrical consumption overall, which is consistent with the defendants' averments about heating a 2003 addition to their premises, the levels of consumption in the summer and fall months of 2002 (August - November) almost all exceed the levels of consumption for the 2002-2003 winter months, by which time the defendants were already heating "almost exclusively" with electrical heat according to their affidavits. Finally, the affidavit reflects that levels of electrical usage were uncommonly high year-round and that cannot be explained away by the mere fact of an addition to the home or the use of electric heat. In other words, there is no reasonable basis to conclude that either an addition or the electric heating had anything to do with the defendants' electrical consumption. Finally, while the Andrew Miller and Harold Page affidavits expose an inaccuracy in Bires's affidavit regarding the information conveyed to him by Page, it is hardly a material misrepresentation. If Bires had accurately reported what Page told him and what Miller discovered through his phone call to Bangor Hydro regarding the information vis-à-vis customers' rates when they heat with electric heat, it would not have diminished the probable cause one iota. Sanborn and Folsom, for whatever reason, did not avail themselves of Bangor Hydro's lower rate structure that would have been consistent with heating their home by electric heat.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **DENY** the defendants' motions to suppress.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served

with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 31, 2004

Case title: USA v. FOLSOM et al

Other court case number(s): None

Magistrate judge case number(s): 1:04-mj-00025-MJK

Date Filed: 05/11/04

Assigned to: JUDGE JOHN A.
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Pending Counts

21:841A=MD.F POSSESSION
WITH INTENT TO DISTRIBUTE
MARIJUANA - 21:841(a)(1)
(1)

21:853.F - CRIMINAL
FORFEITURES 21:853
(2)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

21:841A=MM.F - Manufacturing
Marijuana

Disposition

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Pending Counts

21:841A=MD.F POSSESSION
WITH INTENT TO DISTRIBUTE
MARIJUANA - 21:841(a)(1)
(1)
21:853.F - CRIMINAL
FORFEITURES 21:853
(2)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

21:841A=MM.F - Manufacturing
Marijuana

Disposition

Plaintiff

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